IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM LEE FEDDERSEN, Appellant.	No. 37099-9-II UNPUBLISHED OPINION

Bridgewater, P.J. — William Lee Feddersen appeals his Pierce County convictions for attempting to elude a pursuing police vehicle and third degree driving with a suspended or revoked license. We affirm Feddersen's convictions but remand for resentencing, allowing the State to present evidence of Feddersen's prior convictions.

FACTS

On March 12, 2006, at approximately 2:00 am, Pierce County Deputy Winthrop Sargent drove eastbound to the intersection of 112th Street and C Street where he observed a black pickup truck stopped at the intersection in the southbound lane. The driver of the pickup turned the truck's headlights off and on a few times before slowly turning west on 112th Street, heading in

the opposite direction of Deputy Sargent's vehicle. Deputy Sargent believed that the driver of the truck was requesting contact with him. Deputy Sargent turned his vehicle around and turned on his overhead lights. The pickup truck pulled to a stop, and Deputy Sargent pulled in behind it.

Deputy Sargent approached the vehicle and asked the driver how he was doing. The driver had a driver's license and some paperwork in his hand. The driver then stated that he did not have any insurance. Deputy Sargent asked the driver what the paperwork was and the driver told the deputy that he had just purchased the pickup. He then handed the paperwork to the deputy. The deputy examined the driver's license photo and noted that it matched the driver of the pickup, although in the photo the driver had longer hair and a full beard. At the time of the stop, the deputy noted that the driver had shorter hair and a goatee. The driver's license belonged to Feddersen. The deputy asked the driver why he flagged him down and the driver replied that he had not flagged the deputy down but, rather, was checking to be sure his lights were on.

Deputy Sargent returned to his vehicle with the driver's paperwork and license. Shortly after he began checking the status of the vehicle and license, the driver accelerated away and Deputy Sargent gave chase. Deputy Sargent's lights were already on. In addition, he turned on his wigwags[1] and siren. The driver refused to stop, drove close to 70 miles-per-hour in a 35 miles-per-hour zone, turned multiple times, turned off his lights, and drove through controlled intersections without stopping.

Deputy Sargent lost sight of the pickup, but he had called police dispatch to inform other officers of the pursuit. Another officer observed the pickup and initiated pursuit using lights,

[1] Wigwag refers to flashing headlights.

sirens, and wigwags. Again, the driver refused to stop. The driver continued to gain speed and veered into oncoming traffic. At this point, the monitoring supervisor ordered that Deputy Sargent and the other officer terminate the pursuit, likely due to public safety concerns.

The State charged Feddersen with attempting to elude a pursuing police vehicle and third degree driving with a suspended license. During a pretrial conference, Feddersen's counsel claimed that the State told her that Deputy Sargent used one of Feddersen's recent booking photos from an unrelated matter to identify him. Feddersen's counsel argued that this identification procedure was highly suggestive and therefore, improper. The State countered that Deputy Sargent did not identify Feddersen based solely on the booking photo. Instead, the State alleged that both Feddersen's driver's license and Deputy Sargent's report listed a physical description of the defendant and that Deputy Sargent used the booking photo solely to confirm his previous description.

The trial court held a voir dire to determine how the deputy used the booking photo. Deputy Sargent testified that on the night of the incident he looked at the picture on Feddersen's driver's license and was sure that the driver of the vehicle was the person identified on the license. The trial court ruled that Deputy Sargent's viewing of the booking photo was not highly suggestive and allowed Deputy Sargent to identify Feddersen as the driver in front of the jury.

Feddersen testified at trial, challenging his identification as the driver. He claimed that he was not in Pierce County at the time of the incident. Instead, Feddersen claimed that before the time of the incident, he dated a girl in Tacoma with whom he subsequently split up. He alleged that he left some of his possessions, including his wallet and driver's license at her house because

he did not want to have them with him when he went out drinking. He stated that he later attempted to retrieve the wallet from her but that she told him the wallet and his other possessions were gone. Feddersen testified that he dated this girl on and off for two or three years, but that he did not know her current address.

The State requested a missing witness instruction regarding Feddersen's former girlfriend, which the trial court denied. The trial court did, however, allow the State to make a very limited comment concerning the former girlfriend so long as it did not shift the burden of proof to Feddersen. The trial court clarified that Feddersen's right to remain silent was not an issue because he testified and that the State's burden of proof in this case was to prove the elements of the crimes.

During closing argument, the State commented on the former girlfriend's absence.

> This is a woman . . . who's the defendant's ex-girlfriend, dated for two to three years, knows his mom—knows her mom, they call her Duffy. He says that he contacted her, she said she didn't have it. But you've heard no testimony from her.

4 VRP at 177.

The jury found Feddersen guilty. At sentencing, Feddersen did not stipulate to any prior convictions. Neither did Feddersen dispute any of the alleged criminal history. Using the State's unsigned listing of Feddersen's criminal history, the trial court sentenced Feddersen, using an offender score of seven, to a standard range sentence.

ANALYSIS

I. Prosecutorial Misconduct

Feddersen contends that the State committed prosecutorial misconduct when, during closing arguments, it shifted the burden of proof to Feddersen. Specifically, Feddersen faults the State for mentioning that his former girlfriend did not testify in his defense, presumably to confirm that she retained his possessions including his driver's license after they had stopped dating.

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1969); *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). In order to establish prosecutorial misconduct, Feddersen must show that the State's conduct was improper and prejudiced his right to a fair trial. *Boehning*, 127 Wn. App. at 518. Prejudice is established where "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996)).

"We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." *Boehning*, 127 Wn. App. at 519. "A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *Boehning*, 127 Wn. App. at 519. But a prosecutor commits misconduct by making an argument during closing arguments that shifts the burden of proof to the defendant. *State v.*

Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). Such misconduct affects a constitutional right and requires reversal unless the error is harmless beyond a reasonable doubt. *State v. Moreno*, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006).

If a defendant fails to object to the allegedly improper remark, he waives that error claim unless the remark is so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Here, Feddersen did object, during a motion outside the presence of the jury, to the State being able to argue any inference from the witness not testifying. The trial court ruled that while it would not give a missing witness instruction, it would allow the State to make a limited comment during closing argument regarding the witness not testifying.

The State contends that its statement regarding the absence of the girlfriend's testimony was proper because (1) Washington law allows prosecutors to show the evidentiary deficiencies in Feddersen's case and (2) because the statement was proper under the missing witness doctrine. As it relates to the first contention, the State asserts that in closing argument, a prosecutor is permitted to argue the facts in evidence and the reasonable inferences from them. *Boehning*, 127 Wn. App. at 519.

The State analogizes this case to *State v. Gregory*, 158 Wn.2d 759, 859-860, 147 P.3d 1201 (2006), where during the penalty phase of the trial, the prosecutor noted that a number of the defendant's family members or education instructors did not testify on his behalf. *Gregory*, 158 Wn.2d at 859-60. During rebuttal, the prosecutor stated:

> You know that they hired a mitigation expert to try to dig up anything they could [that was] positive to say about [the defendant], anything they could.
> . . . .
> And you can bet that they put on the very best and all the evidence they could scrape together that they thought could possibly mitigate his responsibility.

Gregory, 158 Wn.2d at 860. Defense counsel did not object. *Gregory*, 158 Wn.2d at 860. The *Gregory* court held that the prosecutor had not improperly shifted the burden because he reminded the jury during his argument that the State held the burden of proof and because the jury instructions further reinforced the proper burden of proof. *Gregory*, 158 Wn.2d at 861. Further, the *Gregory* court determined that the jury would have reached the same result without the improper statements. *Gregory*, 158 Wn.2d at 861.

The State here contends that it merely noted that Feddersen's claim regarding mistaken identity lacked evidentiary support. Additionally, the State claims that it never stated that Feddersen failed to call a witness but, rather, that the jury did not hear any testimony from the witness. The State also points out that the trial court provided jury instructions regarding the burden of proof, which the jury is presumed to follow. While accurate, these arguments seem a bit disingenuous as the State's comment, taken in context, was clearly designed to inform the jury that Feddersen's former girlfriend failed to corroborate his story. But we do not decide this issue based on this rationale. Instead, we hold that the missing witness analysis, discussed next, is dispositive.

The State contends that its argument was proper under the missing witness doctrine. Under the missing witness doctrine, a jury may draw an inference against a party that fails to produce evidence when that party has control of evidence and the evidence is naturally in that

party's interest to produce. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (citing *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)). Washington courts permit the missing witness inference in criminal cases where the defense fails to call logical witnesses. *See, e.g., Blair*, 117 Wn.2d at 488; *State v. Barrow*, 60 Wn. App. 869, 871-72, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991); *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, 115 Wn.2d 1014 (1990). But the inference does not apply in every instance that a defendant fails to call a logical witness.

For instance, courts do not allow the inference when a defendant, as the party against whom the inference would operate, can satisfactorily explain the witness's absence. *Blair*, 117 Wn.2d at 489 (citing 2 John Wigmore, Evidence § 290, at 216 (1979)); *see e.g., State v. Lopez*, 29 Wn. App. 836, 631 P.2d 420 (1981) (where the missing witnesses were transients that could not be located because they had left town). Feddersen contends that he satisfactorily explained his former girlfriend's absence. We disagree.

When Feddersen testified, he stated that he did not have his driver's license at the time of the incident and, thus, could not have been the individual that Deputy Sargent pulled over. He testified that he dated a girl named Erica Cooper from Tacoma for between two and three years. Feddersen claimed that he left his driver's license along with other personal belongings at her house but when he attempted to retrieve them, she told him that they were gone. Feddersen took her at her word. Feddersen knew where Cooper worked at the time of the incident, but he did not indicate whether she still worked there at the time of trial. Interestingly, Feddersen never stated that he did not know how to reach Cooper or that he had unsuccessfully attempted to do so.

Although he stated that he did not know her address, he testified that she still lived in Washington and that her mother, Duffy, still lived in Washington as well. We hold that Feddersen failed to adequately explain his former girlfriend's absence.

Feddersen next contends that the missing witness doctrine did not apply in his case because his former girlfriend was not under his control. Under *State v. Montgomery*, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008), the missing witness must be particularly under the control of the defendant as opposed to the control of both parties. Feddersen claims that the former girlfriend did not meet this standard. Feddersen analogizes his situation to the *Montgomery* court's discussion of landlords. The *Montgomery* court addressed whether the missing witness doctrine applied to the defendant's landlord when the defendant failed to call him as a witness. *Montgomery*, 163 Wn.2d at 599. There was no testimony in the case that the landlord knew of any alternative reason that the defendant would purchase ingredients used to produce methamphetamine. *Montgomery*, 163 Wn.2d at 599. Nor was the landlord specifically under the defendant's control because "few tenants believe they control their landlords." *Montgomery*, 163 Wn.2d at 599. Accordingly, Feddersen argues that few people believe that they control their ex-girlfriends. Feddersen's analogy fails because emotional relationships between parties differ greatly from business relationships between landlords and tenants and the two are not analogous. Accordingly, we hold that the missing witness doctrine allowed the State to point out the absence of Feddersen's former girlfriend's corroborating testimony.

II. Identification Testimony

Feddersen alleges that the trial court violated his due process rights by admitting tainted

identification testimony. Specifically, he claims that the trial court erred by admitting Deputy Sargent's identification of Feddersen because it was impermissibly suggestive, thus violating his due process rights. Criminal defendants have a constitutional right to due process of law. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. Admission into evidence of eyewitness's identification violates due process if it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); *State v. McDonald*, 40 Wn. App. 743, 746, 700 P.2d 327 (1985).

As an initial matter, Feddersen challenges the appropriate standard of review, arguing that we should apply de novo review to determine whether admission of Feddersen's identification violated his due process rights. He cites several federal cases but acknowledges that Division Three of this court has reduced this issue to one of evidentiary admissibility, governed under the abuse of discretion standard. In *State v. Kinard*, Division Three addressed the standard of review for Washington cases, holding that the question was one of evidentiary admissibility, subject to an abuse of discretion test to determine whether tenable grounds or reasons supported the trial court's decision. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001), *review denied*, 146 Wn.2d 1022 (2002). Although Feddersen argues that the *Kinard* court got it wrong, there is no reason for us to depart from the *Kinard* rationale.

Having established the abuse of discretion standard, we must next determine whether the trial court violated Feddersen's due process rights by admitting Deputy Shepard's identification testimony. Feddersen bears the burden of establishing that the identification procedure used here

was impermissibly suggestive. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (citing *State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984)), *review denied*, 140 Wn.2d 1027 (2000). If he is able to establish that the procedure was impermissibly suggestive, we must determine whether, considering the totality of the circumstances, such suggestiveness created a substantial likelihood of irreparable misidentification. *Linares*, 98 Wn. App. at 401. This analysis requires us to consider: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's previous description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *Linares*, 98 Wn. App. at 401. Feddersen alleges that under a totality of the circumstances analysis, Deputy Sargent's identification testimony was impermissibly suggestive.

Feddersen contends that Deputy Sargent had only a brief encounter with the driver, who handed him a driver's license bearing Feddersen's name and photograph. Approximately 18 months later, Deputy Sargent viewed Feddersen's booking photo and then saw him in the courtroom. Feddersen argues that impermissibly suggestive circumstances created a substantial likelihood of irreparable misidentification. We disagree.

The trial court here carefully examined Deputy Sargent's identification of Feddersen before allowing Deputy Sargent to present his testimony to the jury. The State contended that the identification occurred not when Deputy Sargent looked at the booking photo, but rather at the time of the incident. Deputy Sargent testified that he observed Feddersen as the pickup driver. He testified that the pickup driver was the same person pictured on Feddersen's driver's license,

noting at the time that Feddersen's facial hair and length of hair differed from the photo. Deputy Sargent testified that the lighting was good and that he was not distracted during his interaction with Feddersen. He testified that Feddersen's window was down and that he was in close proximity to Feddersen when they spoke.

Feddersen next faults Deputy Sargent for looking at his booking photograph while preparing for his testimony. An out-of-court photographic identification is impermissibly suggestive if it directs undue attention to a particular photo. *Kinard*, 109 Wn. App. at 432-33. Here, Feddersen argues that under *State v. Maupin*, "[t]he presentation of a single photograph is, as a matter of law, impermissibly suggestive." *State v. Maupin*, 63 Wn. App. 887, 896, 822 P.2d 355, *review denied*, 119 Wn.2d 1003 (1992). While this quotation is accurate, it does not apply to the facts of this case. The identification in *Maupin* and all the cases that *Maupin* cites in support of the quotation involve circumstances where a police officer shows only one photo to an alleged eyewitness. *Maupin*, 63 Wn. App. at 896. This was not the situation here.

Deputy Sargent testified that he pulled Feddersen's booking photo to make sure it was the same person that he contacted on the night of the incident. He testified that he recognized Feddersen from the night of the incident. The State argued that Deputy Sargent merely refreshed his recollection by looking at the photo. We hold that Deputy Sargent's procedure here was not impermissibly suggestive and, thus, further analysis is not required.

III. Sufficient Evidence

Feddersen next argues that the evidence was insufficient to support his conviction for attempting to elude because the State failed to prove that each police vehicle was equipped with

more than one siren. When reviewing sufficiency challenges, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003). We draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. *Rangel-Reyes*, 119 Wn. App. at 499.

Feddersen contends that the State failed to satisfy the statutory requirement that the police vehicles were equipped with "sirens." Br. of Appellant at 18. RCW 46.61.024(1) provides:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving the signal shall be in uniform and the vehicle shall be equipped with lights and *sirens*.

RCW 46.61.024(1) (emphasis added).

Feddersen claims that insufficient evidence proved that Deputy Sargent's police vehicle was equipped with "sirens" (plural). Br. of Appellant at 18. Feddersen acknowledges that the assisting deputy's vehicle was equipped with "sirens," but he contends that there is no way to determine whether the jury believed the driver was attempting to elude and driving in a reckless manner after having been signaled to stop by Deputy Sargent, the other deputy, or both. Br. of Appellant at 18. This argument fails for multiple reasons.

First, we will not interpret a statute in away as to lead to absurd, unlikely, or strained results. *State v. Landrum*, 66 Wn. App. 791, 797, 832 P.2d 1359 (1992). The statute here clearly indicates that the officer must signal the driver to stop "by hand, voice, emergency light, or

siren." RCW 46.61.024(1). It is absurd and completely unlikely that the legislature intended for the plural "sirens" to be a dispositive factor in determining whether police vehicles were adequately equipped. Further, the signal to stop requires only that the signal be made by hand, voice, emergency light, or siren. RCW 46.61.024(1).

More importantly, there was sufficient evidence for the jury here to find that Deputy Sargent's vehicle contained more than one siren. Although Feddersen is correct that Deputy Sargent testified that he turned on his wigwags and "activated [his] siren" after Feddersen drove away, he later clarified that he had more than one siren on his vehicle. 3 VRP at 103. Deputy Sargent testified that, when he caught up with the other deputy who was pursuing Feddersen, his car was equipped with sirens:

> Q You'd indicated that another deputy had started—reinitiated the pursuit. Did you see that the deputy had lights on?
> A Yes, his car was like mine.
> Q Do you recall if that deputy had also turned on sirens?
> A Yes, he did.
> Q Okay. And the point which you meet up with them, did you still have your lights and sirens going?
> A Yes.

3 VRP at 109. Sufficient evidence existed such that a rational finder of fact could determine that Deputy Sargent's police vehicle was equipped with "sirens."

Finally, even if Deputy Sargent's police vehicle was only equipped with one siren and multiple sirens are required (similar to the officer being in uniform), any error here is harmless because during the pursuit, the other deputy's vehicle was undoubtedly equipped with multiple sirens. Thus any error here is harmless.

IV. Jury Instructions

Next, Feddersen claims that the trial court's "to convict" instruction relieved the State of its burden to prove that the police vehicle was equipped with lights and sirens. Jury instructions that relieve the State of its burden to prove every element are erroneous. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Here, the "to convict" instruction did not include the requirement that the police vehicle be equipped with lights and sirens as RCW 46.61.024(1) requires. The State concedes that the instruction was deficient, but it claims the error was harmless.

Washington courts now hold that erroneous jury instructions that omit an element of the charged offense or that misstate the law are subject to harmless error analysis under *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). The *Neder* test for determining whether a constitutional error is harmless is whether it appears beyond a reasonable doubt that the complained of error did not contribute to the verdict. *Thomas*, 150 Wn.2d at 845. As it pertains to the omissions or misstatements of elements in jury instructions, the error is deemed harmless if uncontroverted evidence supports that element. *Thomas*, 150 Wn.2d at 845.

Here, it is uncontroverted that both deputies testified that their vehicles were equipped with lights and sirens. Further, the omission of the "lights and sirens" portion of RCW 46.61.024(1) in the "to convict" instruction did not contribute to the verdict here. *Thomas*, 150 Wn.2d at 845. We hold that although the "to convict" instruction here was erroneous, the error was harmless.

V. Offender Score

Feddersen challenges the trial court's assessment of his criminal history and calculation of his offender score. Specifically, Feddersen contends that the State attempted to establish his criminal history through nothing more than bare allegations, in violation of *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999).

We review a sentencing court's offender score calculation de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). It is the State's burden to prove the existence of previous convictions by a preponderance of the evidence. *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). The State does not meet its burden of establishing previous convictions through bare assertions that the evidence does not support. *Ford*, 137 Wn.2d at 482. Under former RCW 9.94A.530(2) (2005), the sentencing statute in effect at the time of Feddersen's conviction states:

> The trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing . . . Acknowledgment includes not objecting to information stated in the presentence reports.

Former RCW 9.94A.530(2).[2]

The *Bergstrom* court set forth three approaches to analyzing a sentencing court's offender score determination. *Bergstrom*, 162 Wn.2d at 93. These three approaches are: (1) if the State alleges the existence of prior convictions at sentencing and the defense does not specifically object so as to put the trial court on notice of the alleged error before the trial court imposes the sentence, we should remand for resentencing, during which the State is permitted to introduce

[2] Our legislature has since amended RCW 9.94A.530(2) to read, "Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing." *See* Laws of 2008, ch. 231, § 4.

new evidence; (2) if the defense does specifically object during the sentencing hearing but the State fails to present any evidence of the defendant's prior convictions, we should remand for resentencing, during which the State is not permitted to present new evidence; and (3) if the State alleges the existence of prior convictions and the defense not only fails to object, but agrees with the State's depiction of his criminal history, the defendant waives the right to challenge his criminal history. *Bergstrom*, 162 Wn.2d at 93-94.

The facts of Feddersen's case do not fall neatly within any of the three circumstances the *Bergstrom* court defined. Here, the State presented the sentencing court with a list of Feddersen's alleged prior convictions titled "STIPULATION ON PRIOR RECORD AND OFFENDER SCORE (Plea of Guilty)." CP at 39. The signature lines for both Feddersen and his counsel read "Did not sign." CP at 41. The State acknowledged that Feddersen and his counsel had not signed the document, but it indicated that it was the State's understanding that "they are in agreement with the total points of seven." 5 VRP at 205. Feddersen's counsel stated:

> [Feddersen is] not disputing any of the crimes, Your Honor, we just don't stipulate after trial, we stipulate because it's usually a condition of the plea agreement.

5 VRP at 205. There is no other discussion of Feddersen's criminal history or offender score contained in the record. Feddersen asserts in a footnote in his opening brief that when his counsel stated that he did not dispute any of the crimes, his counsel actually meant "to hold the [S]tate to its minimal burden of establishing Mr. Feddersen's criminal history." Br. of Appellant at 25. The trial court sentenced Feddersen using an offender score of seven, presumably based on the unsigned stipulation, and checked the box indicating that Feddersen was on community placement

at the time of his current offenses.

We hold that the State failed to present evidence of Feddersen's criminal history. Under *Ford*, the prosecutor's assertions are not fact nor evidence, but merely argument. *Ford*, 137 Wn.2d at 483 n.3. Because the trial court apparently relied on the unsigned stipulation list, evidence in the record fails to support Feddersen's offender score. Thus, we remand for resentencing. *Ford*, 137 Wn.2d at 486. The next question we must answer is whether the State will be permitted to bring additional evidence to prove Feddersen's criminal history. *Ford*, 137 Wn.2d at 485. Under *Ford* and the first of the three *Bergstrom* approaches, the State should be allowed to do so based on Feddersen's failure to put the trial court on notice of the alleged discrepancy before it imposed sentence. *Bergstrom*, 162 Wn.2d at 93-94; *Ford*, 137 Wn.2d at 485.

VI. Enhancement

Finally, Feddersen alleges that certain facts relating to his prior convictions must be proved to a jury beyond a reasonable doubt before such convictions can be used to enhance a sentence. Feddersen includes this argument as an attempt to get this court to rule that the *Apprendi* "prior conviction" exception was wrongly decided by the *Almendarez-Torres* court and also to convince this court to explore the limits of said exception. Br. of Appellant at 26 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Further, Feddersen asks us to reconsider several opinions in which we determined that the "fact" of a prior conviction includes the offender's identity. Br. of Appellant at 31 n.8. We decline this

invitation.

Convictions affirmed; remanded for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

Armstrong, J.

Hunt, J.